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CONVEYANCE OF LAND INCLUDES BUILDING MATERIAL, FITTED FOR USE THEREON.—The recent case of *Byrne v. Werner* (Mich. Sup. Ct., Dec. 7, 1904), 101 N. W. Rep. 555, decides a question of interest in regard to what passes under a deed of land upon which is a partially constructed building and upon and near which is material fitted for use in the completion of the building. The controversy was between the vendee of the building material not as yet used in the building at the time of the conveyance of the realty and the owners of the realty. In 1887 the then owner of the realty conveyed the property, describing it as lots four and five of block seventeen in the city of Marquette, Michigan. At this time there was upon the lots a partially constructed building. There was also upon them and an adjoining lot a quantity of cut stone and structural iron, the property in controversy, which was put there by the owner of the lots with the intention of using it in the completion of the building. The stone had been cut and dressed expressly for this building, and each piece of the structural iron had been fitted for its place in the building in accordance with the plan. The title to the realty came to the present owners in 1902 through two conveyances, each containing presumably a description like the one given above. Nothing was done toward the completion of the building after the original owner parted with his title in 1887, and the unused material, when the present owners took title, was still on and near the lots. The deed from their immediate grantor, when first drawn, included definitely in the description the said building material, but, upon the request of the grantees, it was changed, and a separate bill of sale of the material given. The original owner, nine years after conveying his title to the said lots, executed a bill of sale of said building material to his son, the plaintiff herein, but it does not appear that the son ever attempted in any way, before the beginning of this suit, to assert title to said material. The present owners of the lots erected a business block thereon, using a small portion of the building material in question, and disposing of the remainder. An action of trover was brought against them by the vendee under said bill of sale, and in the court below the plaintiff had judgment.

The essential question in the case is as to what passed under the deed of the original grantor, executed in 1887. If the building material passed, the bill of sale thereof to the plaintiff was a nullity, and the judgment below should be reversed. The majority of the Supreme Court held that it did pass, and reversed the judgment, basing their conclusion, however, upon the evident intention of the parties, and not upon the proposition that the personality, as between grantor and grantee, became a part of the realty. The CHIEF JUSTICE, with whom JUSTICE HOOKER concurred, dissented upon the ground that the building material did not become a part of the realty. The reasoning of the majority opinion appears from the following quotation: "It is urged that the building material had not become a part of the land, and was, therefore, in a legal sense, personalty at the time of the conveyance to Thurber. If this be true, it is not, in my judgment, decisive of this controversy. Though the building material was personalty, it is our duty to declare that it passed with the partially completed building, if the parties so intended, and if that intent may be ascertained from a proper construction of the conveyance

of the land upon which said building stood. The question is then, not whether the building material was in fact personalty, but whether it was intended to transfer it with the conveyance of the partially completed building. And this intent is to be determined by a proper construction of the conveyance; that is \* \* \* by applying the language of the conveyance to its subject matter. No uncertainty results from this rule. Upon the land conveyed to Thurber was an incomplete building in the process of erection. Situated upon that land and upon the adjoining land was building material designed to be used for the completion of the building. It was surely intended that the incomplete building should be transferred to Thurber. It was surely intended that the building would be speedily completed with the building material at hand. And I think it therefore equally certain that it was intended that such material should pass with the conveyance. In my judgment, there is no sound principle of law which compels us to defeat this intention. On the contrary, I maintain that it is our clear legal duty to give it effect. I think, therefore, that the building material became the property of Thurber."

The conclusion of the majority is undoubtedly correct. It is supported by abundant authority collected and commented upon in the opinion. It is suggested, however, that it may prove to be the better reasoning in support of the conclusion to argue that as between grantor and grantee, for the purposes of the conveyance, the building material had become realty and passed under the deed as such; that it had become realty for the purposes suggested by virtue of the circumstances of the case and the intention of the parties; that it was fitted for use upon the realty by the grantor and was intended by him for use thereon; that for certain purposes it was constructively a part thereof. The material was not described by special or general reference or in any manner in the deed, nor does it appear that it passed to the grantee by any separate agreement. If, therefore, it passed under the deed, it must have been because, for the purpose of conveyance, it had become a part of the realty. And certainly there is no inconsistency in concluding that it did so pass, for it goes without saying that property may be personalty for one purpose and realty for another. Growing crops, for example, for many purposes are personalty, yet as between grantor and grantee of the land upon which they are growing, they are a part of the realty. Many articles that as between landlord and tenant would be personalty, become a part of the realty, if placed thereon by the owner, and pass by his conveyance. Personalty, if actually or constructively attached to the realty by the owner, or if specially fitted for use thereon, presumptively becomes a part of the realty as between grantor and grantee. Indeed, the cases cited in the majority opinion in support of the conclusion reached, almost without exception are clearly based upon the theory that the personalty in question for the purposes of the conveyance had become a part of the realty. For example, in *Hackett v. Amsden*, 57 Vt. 432, one of the cases cited, the court uses the following language: "Whatever the rule may be elsewhere, it seems to be settled in this state that suitable materials deposited upon a farm for the purpose and with the intention of building necessary fences with them thereon pass by a conveyance of the land as a part of the realty." And

again, the Supreme Court of Illinois, in *Palmer v. Forbes*, 23 Ill. 301, also cited in the majority opinion, uses this language: "It is a familiar principle to all that rails hauled on to the land, designed to be laid into a fence, or timber for a building, although not yet raised, but lying around loose and in no way attached to the soil, are treated as a part of the realty, and pass with the land as appurtenances." The reasoning outlined undoubtedly finds support in most of the cases in which a conclusion similar to the one in the case under examination has been reached.

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THE WAIVER OF FATAL DEFECTS IN AN INDICTMENT.—A very questionable decision on criminal procedure has recently been rendered by the New York Court of Appeals. An indictment was presented for conspiracy to cheat and defraud, and the jury found a verdict of guilty. No motion in arrest of judgment was made, and the only appeal taken was from the judgment of conviction. In the Court of Appeals the defendant sought for the first time to raise the question that the indictment charged no crime, since the representations set forth therein did not refer to any existing *fact* capable of proof but only to the *belief* of the defendants that they could cure all bodily afflictions.

JUDGE VANN, speaking for the court, said that an indictment, except in capital cases, could not be attacked upon appeal unless some foundation was laid therefor before final judgment was rendered. Therefore, the objection that the indictment charged no crime was waived if not raised in the trial court.

JUDGE O'BRIEN, with whom concurred CHIEF JUDGE CULLEN, dissented from this doctrine, saying: "The charge in the indictment is the very foundation of all procedure, and I think, where no crime is charged, the question can be raised at any time and in any court. \* \* \* In our code the want of jurisdiction and the absence of a criminal charge are classed together and treated in precisely the same way, and, indeed, as matter of reason, it cannot be said that any court has jurisdiction to try a criminal case unless it appears that a crime is charged and embraced in the indictment." *People v. Wiechers* (1904), — N. Y. —, 72 N. E. 501.

Undoubtedly there is far too prevalent a tendency among American appellate courts to reverse criminal cases for technical and unsubstantial errors. And it has been frequently suggested that this tendency has given occasion for much of the popular distrust respecting the administration of justice. But in this case the court seems to have gone to the very opposite extreme, and has sustained a judgment of conviction against a defendant who was never legally charged with any offense whatever. This is neither good logic nor good law.

The very recent case of *State v. Rosenblatt* (1904), Mo. —, 83 S. W. 975, published subsequently to the New York case under discussion, holds that "a defendant in a criminal case may take advantage of a material defect apparent of record though such point be raised for the first time in this court." In this case there was a plea of guilty, and the court, taking the same line of argument